

IN THE UNITED STATES DISTRICT COURT
IN AND FOR THE DISTRICT OF DELAWARE

GREATBATCH LTD.,
Plaintiff,
v
AVX CORPORATION, and
AVX FILTER CORPORATION,
Defendants.

CIVIL ACTION
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:
NO. 13-723-LPS

Wilmington, Delaware
Monday, November 19, 2018
Telephone Conference

BEFORE: HONORABLE LEONARD P. STARK, Chief Judge

APPEARANCES:

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and

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1 **APPEARANCES: (Continued)**

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P R O C E E D I N G S

(REPORTER'S NOTE: The following telephone conference was held in open court, beginning at 2:47 p.m.)

THE COURT: Good afternoon, everyone. This is Judge Stark. Who is there, please?

MS. PIERGIOVANNI: Good afternoon, Your Honor. This is Rosemary Piergiovanni from Farnan representing Greatbatch. I have on the line with me Jim Muldoon from Harris Beach, and Laurie Smalley, also from Harris Beach.

THE COURT: Okay.

MR. RAWNSLEY: And, Your Honor, this is Jason Rawnsley of Richards Layton & Finger for AVX; and I'm joined by Robert Whetzel of Richards Layton; and Ron Cahill and Micah Miller of Nutter McClellan.

THE COURT: I have my court reporter here with me. For the record, it is our case of Greatbatch Limited versus AVX Corporation, et al, Civil Action No. 13-723-LPS. This is the time that I set to talk about two of the motions to strike that are pending and were the subject of letter briefs.

I want to first discuss Greatbatch's motion to strike portions of AVX's report related to noninfringing alternatives. So let me hear from Greatbatch first on that one, please.

1 MS. SMALLEY: This is Laurie Smalley from
2 Harris Beach, Your Honor, representing Greatbatch. I'll be
3 addressing the motion to strike.

4 AVX has offered both technical and damages
5 expert testimony relating to the '095 patent that could have
6 been offered prior to the first trial on damages in January
7 26, 2016, but was not disclosed in AVX's expert reports
8 presented in the first trial. It has also offered testimony
9 on apportionment not disclose in its original expert reports
10 represented during the first trial.

11 The Court's Order granting a new trial at Docket
12 No. 1013 notes that AVX asked for a motion for new trial
13 based on three grounds: That the 2017 jury verdict that
14 certain Ingenio FFTs did not infringe the '715 patent
15 contradicted the assumption upon which the 2016 damages
16 verdict was based; that because of the general verdict form,
17 there was no means to extract damages attributed to the '715
18 patent from the lump sum jury award; and the post-trial
19 Federal Circuit decision that finally invalidated claims
20 11 and 13 of the '627 patent provided noninfringing
21 alternatives that AVX was unable to present to the first
22 jury.

23 The Court granted AVX a new trial based on
24 essentially the grounds that were raised. The Court did not
25 believe the existing damages award could be attributed to

1 specific patents or products, and the Court's Order stated
2 that it was granting a new trial so a jury could determine
3 whether platinum pin Ingenio FFTs were noninfringing
4 alternatives to the '715 patent and because possible
5 noninfringing alternatives to the '627 patent could exist
6 and should be presented to the new jury.

7 There was nothing in the Court's Order that
8 contemplated AVX's new noninfringing alternatives to the
9 '095 patent or any noninfringing alternatives to the '715
10 patent other than the noninfringing platinum pin Ingenio
11 FFTs.

12 THE COURT: Ms. Smalley, let me stop you there
13 because I think --

14 MS. SMALLEY: Sure.

15 THE COURT: I think the question may actually
16 be the flip of that, the reverse of that. Where is there
17 anything that limits what AVX can do in the new expert
18 discovery that I ordered in connection with the new trial?

19 MS. SMALLEY: Basically, Your Honor, the expert
20 discovery order does provide for supplemental reports but
21 it's within the Court's discretion and it's the general
22 rule that new evidence and exhibits should not be presented
23 at a second trial outside of if the Court deems a compelling
24 need, or I think the language is.

25 THE COURT: Right. Now, I have seen those

1 cases, but that is what I wanted to understand. I have
2 not seen you point me to anything in the opinion granting
3 the new trial or in the supplemental scheduling order or
4 anywhere else where I said in this case, I'm going to
5 exercise my discretion to limit what the expert discovery
6 is going to be in connection with the new trial. I see the
7 case is about sort of the general background presumption and
8 I just wanted to understand are you relying on that general
9 background presumption or is there something specific that I
10 have done in this case to limit AVX?

11 MS. SMALLEY: I mean I would obviously defer
12 to the Court on the interpretation of its own order, but the
13 order granting a new trial was for a specific purpose. It
14 wasn't to entitle AVX to redo its damages case.

15 THE COURT: Well, let me better understand that.
16 I thought that the damages trial is in part due to the fact
17 that certain of the premises and assumptions that underlie
18 the earlier damages verdict are no longer operative and
19 given the general verdict form that we used last time, we
20 really don't know what the jury thought about, for instance,
21 potential noninfringing alternatives for any of the patents.
22 We can speculate maybe some speculations are more likely
23 than others, but we really don't know and therefore we need
24 a new trial on damages.

25 Wasn't that what I articulated?

1 MS. SMALLEY: Yes, Your Honor. But that doesn't,
2 in my opinion, allow AVX to present new noninfringing
3 alternatives to the '095 or the '715 patent. I mean it had
4 noninfringing alternatives it presented at the first trial
5 but this is new information that doesn't relate to the Court's
6 grant of a new trial.

7 THE COURT: All right. Well, even the cases you
8 cite say that the Court has discretion to allow new opinions
9 even though they could have been raised in connection with
10 the earlier trial. Why shouldn't I at this point be
11 exercising that discretion in that direction?

12 MS. SMALLEY: Because that gives AVX an unfair
13 advantage. The reason for the new trial was related to very
14 specific things, the noninfringement verdict on the '715
15 patent and the possibility of noninfringing alternatives of
16 the '627 patent related to the Federal Circuit decision
17 affirming the PTAB invalidation of those claims. I mean this
18 in essence, if the Court were to allow new evidence, would
19 give AVX a redo and a chance to improve its case after seeing
20 Greatbatch's case.

21 THE COURT: Okay. Thank you. Let me hear from
22 AVX on this motion, please.

23 MR. CAHILL: Thank you, Your Honor. This is Ron
24 Cahill on behalf of AVX.

25 Your Honor, we believe that the Court's Order

1 didn't limit discovery in any way. That the Court correctly
2 vacated the existing damages verdict and ordered a new trial.
3 And that the facts on the ground changed between 2016 and
4 2018.

5 Ms. Smalley mentioned the '715 patent. The
6 last time we tried infringement on the '715 patent, there
7 was an assumption that all Ingenio parts infringe, and that
8 assumption doesn't exist anymore, and we know, in fact, that
9 some of them don't. And, in fact, that contradicts some of
10 the evidence and testimony that Greatbatch put on in 2016.

11 So the case now is a little bit different, and
12 nowhere in Greatbatch's argument or briefing does one find
13 any actual prejudice to Greatbatch. AVX presented its
14 expert opinions according to the schedule that the Court set.
15 Greatbatch responded to those expert reports according to the
16 schedule that the Court set, provided something like a half
17 a dozen more expert reports in response, and was able to
18 take the depositions of the Greatbatch experts -- of the
19 AVX experts. So there is no prejudice, there is no unfair
20 advantage, and this is what we asked for when we moved the
21 Court to vacate the damages verdict and it have a new trial.

22 THE COURT: Okay. Thank you.

23 Ms. Smalley, do you want to reply?

24 MS. SMALLEY: Your Honor, the prejudice isn't the
25 time in having our experts respond. We will have to use trial

1 time to rebut alternatives and other expert opinions that were
2 not presented in the first trial, and because AVX is being
3 permitted to develop new evidence that it could have developed
4 before the first trial after seeing Greatbatch's case. I mean
5 it lost the damages issues in the first case and now it gets
6 to revise its theories having seen how trial played out.

7 Now, while we recognize that the Court did allow
8 that to a certain extent due to the verdict on the '715
9 patent and claim 12 of the '627 patent, we believe that this
10 is an advantage beyond that provided by the Court's Order.

11 THE COURT: Okay. Thank you. I'm denying
12 Greatbatch's motion. I did not place the limitations on
13 expert discovery that Greatbatch suggests that I did or
14 maybe should have. Instead, I have ordered a new trial on
15 damages. I ordered a new period for expert discovery and
16 expert reports. And there just was no point at which I
17 imposed the limits on that discovery or opinions.

18 For instance, the limitation that if you could
19 have come up with this noninfringing alternative prior to
20 the first trial but you didn't, you can't -- that limitation
21 just isn't anywhere in this case. There are other cases
22 where such a limitation might be appropriate. In this
23 case, in my view, it was not appropriate and at this point
24 certainly is not appropriate. We vacated the damages award
25 in part based on the verdict form that was used at the first

1 trial, and the failure of certain assumptions that were told
2 to that jury based on subsequent events, those assumptions
3 are no longer operative. So we need a new trial and AVX
4 acted consistent with the letter and the spirit of the
5 scheduling order here.

6 To the extent there is prejudice to Greatbatch,
7 it's not unfair prejudice. Greatbatch has had every fair
8 opportunity and I think has apparently taken advantage of
9 them to respond in a timely manner to the new opinions.
10 There is no evidence of bad faith. AVX's conduct is well
11 explained in the record. This evidence is important. And
12 there will be no impact on the trial for me allowing AVX to
13 have done what it did, which is consistent with my order.

14 So for all those reasons, Greatbatch motion is
15 denied.

16 Let's turn then to the AVX motion. AVX is
17 seeking to strike certain Greatbatch expert opinions that it
18 contends are contrary to the Court's construction of terms
19 in claim 12 of the '627 patent. This one is AVX's motion,
20 so let's hear from AVX first, please.

21 MR. CAHILL: Thank you, Your Honor. This is Ron
22 Cahill for AVX.

23 First, I think it makes sense to talk a little
24 bit about the claim construction. The Court took up claim
25 construction in the context of the issue of indefiniteness

1 shortly before the 2016 trial. And at that point, the term
2 "asymmetrical" had not been construed, and at the request of
3 both parties, the Court construed it to mean "not symmetrical."

4 But the Court didn't stop there. The Court
5 added two examples of capacitors that would be symmetrical.
6 And one of them was a capacitor having a bisecting plane
7 containing the line passing through the ground lead
8 passageway wherein the bisecting plane creates a mirror
9 image of non-ground lead passageways on either side of the
10 bisecting planes.

11 AVX, through its expert reports, presented a
12 series of noninfringing alternatives that fell squarely
13 within that example of symmetrical that the Court provided.
14 And therefore, those noninfringing alternatives cannot be
15 asymmetrical. And this is obviously critical in the case
16 because the only -- there claim 12 which AVX is accused of
17 infringing requires an asymmetrical capacitor while claim 13
18 which has been invalidated calls for a symmetrical capacitor.
19 So if the capacitors are symmetrical, they are noninfringing.

20 Greatbatch doesn't argue that AVX's noninfringing
21 alternatives fall outside of the Court's example of symmetrical
22 so apparently they are symmetrical but they're also
23 nonsymmetrical according to Greatbatch because of other
24 features that don't appear anywhere in the Court's claim
25 construction. So even though the noninfringing alternatives

1 fall squarely within the example of symmetrical, expert
2 opinions from Greatbatch experts say they are asymmetrical,
3 for example, because a ground electrode has a slightly
4 different shape on the left than on the right. But that
5 doesn't have anything to do with the example of symmetrical
6 that the Court provided. An example that was based on the
7 intrinsic evidence of the '627 patent.

8 Now, in other contexts, including the 2016
9 trial, Greatbatch agreed that it was that extra passageway
10 the hole for the RF pin, that it was that that determined
11 whether the capacitor was symmetrical or asymmetrical.

12 In fact, Mr. Whetzel asked Greatbatch's expert
13 during that trial: And if you didn't drill that hole, would
14 the capacitor be symmetrical?

15 And the expert responded: That would change the
16 symmetry. Yes.

17 Now, during a recent reexamination of the '627
18 patent, here in the context of Greatbatch trying to preserve
19 the validity of claim 12, Greatbatch told the Patent Office,
20 according to the District Court construction of "symmetry,"
21 to determine whether a filter capacitor is asymmetrical,
22 there has to be an internal ground pin and the active
23 terminal pins must not be symmetrical with respect to the
24 internal ground pin.

25 So, again, Greatbatch is adopting this position

1 that it depends on where the pins are, not on anything else.
2 And they do that to preserve the validity of claim 12.

3 We think the construction that we put forth in our
4 brief is the Court's construction. And that we have followed
5 that construction using the English language and that
6 Greatbatch at other times in this litigation has expressly
7 agreed with that. And yet now they say it doesn't work.
8 That even though the capacitor is symmetrical, their expert
9 says it's asymmetrical.

10 That works a tremendous prejudice to AVX because
11 if they're allowed to say this at trial, then we have got
12 to argue the claim construction to the jury. We have got to
13 unravel all of this on both cross-examination and with our
14 own experts, and that just isn't fair.

15 THE COURT: All right. Mr. Cahill, a couple
16 questions then.

17 Are you taking the view that asymmetry is only
18 evaluated with regard to the location of the passageways and
19 not with respect to any other design features of the filter
20 capacitors?

21 MR. CAHILL: Well, Your Honor, I don't think we
22 go that far because "asymmetrical" means "not symmetrical"
23 and the Court has given an example of symmetrical based on
24 the passageways. We fall within that example and so we're
25 symmetrical in claim 13 and not asymmetrical in claim 12.

1 Whether there could be some different way to determine what
2 is asymmetrical, I mean that is, it seems to us to be beside
3 the point. The Court gave us an example of symmetrical, and
4 we fall within that example.

5 THE COURT: So in Greatbatch arguing against
6 your position in this motion, they take me back to certain
7 discussions we've had at least related to these issues in
8 which they at least contend that I have said that the
9 examples in connection with the construction of asymmetry
10 in the summary judgment opinion, that those examples are
11 just examples and they're not exhaustive. There may be
12 other examples of symmetrical embodiments, for instance.

13 If that is my view, can you still prevail on
14 this motion?

15 MR. CAHILL: Well, Your Honor, it doesn't matter
16 how many examples of symmetry there are. We only have to
17 meet one example of symmetry in order to be symmetrical.
18 The capacitor can't be symmetrical and asymmetrical at
19 the same time. So if we meet one example of symmetry, the
20 capacitor is symmetrical. And, again, Greatbatch's expert
21 has agreed with that proposition at other times in this
22 litigation. And so if there were 1,000 examples of what is
23 symmetrical, it wouldn't matter to this motion because we
24 meet one of them.

25 THE COURT: Now, I suppose, and we'll see if

1 Greatbatch is arguing this, but another way of looking at
2 it might be that there is more to the filter capacitor, and
3 so just because you meet this example with the mirror image
4 and the pins, if the rest of the capacitor was something we
5 would all indisputably agree is not symmetrical, it's
6 asymmetrical, then I just didn't go far enough in explaining
7 in my earlier opinion because it wasn't the arguments being
8 made to me and, therefore, what I said was incomplete and
9 you're sort of misinterpreting it. Why would that not be the
10 correct conclusion here?

11 MR. CAHILL: Your Honor, I'd like to take that
12 on in three parts.

13 The first is the Court's construction was based
14 on examples in the '627 patent. And the specific example
15 in the '627 patent that we're talking about is in column 9
16 in the paragraph that starts at line 4 and it says: The
17 conductive terminal pins are symmetrically positioned by the
18 central ground pin. And that is an embodiment that we all
19 agree is a symmetrical capacitor.

20 And so except that, I guess, Your Honor,
21 except to the extent that we disagree, which we have noted
22 consistently in our briefing, it's those pins that form the
23 symmetry that makes it symmetrical.

24 Second, Greatbatch at several other times
25 throughout this litigation has agreed completely with that

1 position, and they are changing what they're saying now
2 because it suits their purpose now. When they were arguing,
3 invalidity was in play, they have consistently said that
4 it's about the pins or the holes, whichever one you pick.
5 That is what defines the symmetry and asymmetry; and it's
6 helpful found on validity, and now that the validity has
7 been upheld, they shouldn't be allowed to change it.

8 Then third, Your Honor, if it's the case that
9 the Court thinks that the Court didn't go far enough and
10 it is now going to change the claim construction, then that
11 works incredible prejudice on AVX because our experts took
12 the claim construction we had and specifically designed
13 noninfringing alternatives to fit the example that the
14 Court gave us. They could have done something else, if the
15 claim construction had said something else. If the claim
16 construction changes now, then we would need to update our
17 expert reports.

18 THE COURT: Okay. Thank you.

19 Let me give Greatbatch a chance. Go ahead, please.

20 MR. MULDOON: That's my turn, Your Honor. This
21 is Jim Muldoon.

22 AVX clearly had notice of the issue with respect
23 to the symmetry issues on the feedthrough filter capacitor.

24 The claim language is not that the holes or the
25 passageways are symmetrically distributed throughout the

1 capacitor, it is that the capacitor is asymmetrical. And
2 the Court, at the motion to reargue claim construction, was
3 very clear in its questions to AVX's counsel that it should
4 be the capacitor as a whole, and AVX's counsel responded
5 very clearly, yes, it is as a whole, that included the
6 passageways as well as the plates.

7 Additionally, at trial, when the issue popped
8 up with respect to Professor Webster's testimony regarding
9 symmetry of plates, there was a sidebar and the Court asked
10 AVX's counsel very specifically whether or not the order
11 was limited or that there weren't other ways to measure
12 symmetry. And, again, AVX's counsel acknowledged that the
13 claim construction order was not limited solely to the
14 passageways.

15 With respect to the USPTO and the reexamination,
16 there was clear -- just as the Court expressly found at oral
17 argument that there was no disclaimer in the prosecution
18 history, the PTO found no disclaimer and used the plain
19 meaning of the word "asymmetrical," taken right out of a
20 dictionary which is essentially identical with the Court's
21 meaning and construction.

22 The fact that AVX chose to have its experts
23 opine on a theory that Dr. Hillman actually admitted in his
24 deposition testimony a few weeks ago that he is limiting
25 his claim construction or his interpretation of the Court's

1 claim construction to be limited solely to the passageways.

2 We have included the images in our briefing
3 where there are extensive protrusions on one side of the
4 capacitor body that are not there on the other. There are
5 protrusions in the plates on one side that are not there on
6 the other. And we don't believe that there is any way that
7 those now new hypothetical alternatives that never existed
8 during the accounting period can be called hypothetical --
9 I'm sorry -- asymmetrical.

10 We disagree with AVX's counsel's twisting out
11 of context statements of Dr. Pilgrim that he has said that
12 these are symmetrical or that he admitted that you don't
13 look at the capacitor as a whole in determining symmetry.

14 These are new alternatives that were for the
15 first time disclosed in the defendant's responding expert
16 reports on September 11th; and it is only fair that
17 Greatbatch's experts in their reply reports got a chance
18 to opine on these new hypothetical alternatives that were
19 only disclosed then.

20 This is an issue that the Court has already
21 raised and clarified in its motion hearings at trial; and we
22 do not believe that claim construction -- that asymmetrical
23 is not symmetrical is inappropriate in any way. There is no
24 disclaimer that has been the plain meaning of the term that
25 everybody has learned since their second grade math sheets

1 of looking at symmetrical and asymmetrical devices. Therefore,
2 the motion to strike should be denied.

3 THE COURT: All right. I need some further
4 assistance, Mr. Muldoon.

5 So I'm looking at some of the images that you
6 provided, for instance, at page 4 of your letter brief which
7 I think has depictions of what I understand to be I think
8 all six of the noninfringing alternatives according to the
9 new report.

10 If we focus on the four towards the upper end
11 of the page as opposed to the two on the bottom of the page
12 -- are you with me?

13 MR. MULDOON: Yes, Your Honor.

14 THE COURT: Okay. So on those four, for any of
15 them, and I don't know if the analysis is different on them,
16 do any of them have a bisecting plane containing the line
17 passing through the ground lead passageway wherein the
18 bisecting plane creates a mirror image of non-ground lead
19 passageways on either side of the bisecting plane?

20 MR. MULDOON: Your Honor, that is exemplary
21 language. Okay. The holes are evenly distributed around
22 the ground pin, Your Honor. That does not indicate that
23 the capacitor as a whole is symmetrical.

24 THE COURT: Okay. But that is a "yes," right?
25 All four of them do meet that language that I just read from

1 the summary judgment order; correct?

2 MR. MULDOON: I don't remember if it was a
3 summary judgment order or the claim construction. Yes,
4 Your Honor. That those distributions of one feature of the
5 capacitor are symmetrically distributed. However, the
6 other features of the capacitor which counsel has admitted
7 on diversification the plates are clearly not symmetrical.

8 THE COURT: So to be clear, DI 546, at page 23,
9 it was the summary judgment opinion, and that is where we
10 were asked to, and did, construe "asymmetry." And so the
11 sentence I'm reading to you from says: As illustrated in
12 embodiments of the '627 patent, "symmetrical" means, for
13 example ... and then I read to you the first example.

14 So it seems to me that you have agreed that one
15 or more, probably all four of these examples do satisfy what
16 the Court said in describing "symmetrical." Am I correct
17 about that?

18 MR. MULDOON: Your Honor, clearly the argument
19 at the time was focused on one particular feature of the
20 capacitor. There, the passageways, since there was obviously
21 five on one side and four on the other or six on one side and
22 five on the other. Merely focusing on one feature does not
23 make the entirety of the device symmetrical.

24 THE COURT: Okay. But still, and we'll get
25 there, at this point I think you have to agree that what I

1 said is an example of symmetrical is satisfied by those four
2 examples that AVX has come up with; correct?

3 MR. MULDOON: Your Honor, since those examples
4 are taken from the examples that are expressly named
5 "symmetrical" in the patent, Figures 1 through 6, and the
6 circular one, there are other features of those capacitors,
7 the shape of the capacitor, the location of the pins being
8 equidistant from the ground pin, that is, do these meet the
9 limitation if we focus solely on the ground pins and ignore
10 all other features of the capacitor? Yes, Your Honor.

11 THE COURT: Now, if those devices meet the
12 definition of "symmetrical," do you agree that that means
13 they cannot be asymmetrical?

14 MR. MULDOON: No, Your Honor.

15 THE COURT: So I think I know why you are saying
16 that. And I will give you a chance to explain, but is it your
17 position that a device can be symmetrical and asymmetrical at
18 the same time?

19 MR. MULDOON: Where a device is asked, the
20 symmetry has to be measured of the capacitor as a whole,
21 Your Honor, the Court should look at all of the features
22 of the capacitor, including the shape of the body and the
23 ground plates which are explicitly part of the capacitor
24 and described as such in I believe it is column 7 of the
25 patents in the upper third of that column where it talks

1 about the capacitor being a monolithic ceramic capacitor
2 having passageways, plates, and a dielectric ceramic that
3 surrounds the plates. And when a capacitor should be
4 symmetrical, it should be all of those features that are
5 symmetrical.

6 Now, we do not -- there can be, Your Honor --
7 just because the headlights on a car are symmetrically
8 placed doesn't mean that there isn't a single steering
9 wheel and accelerator and brake pedal in the car. So just
10 by looking at one feature and saying that feature is
11 symmetrical does not make the entirety of the device
12 symmetrical.

13 THE COURT: Right. What I'm understanding
14 from that is it is possible if you just are looking at the
15 placement and number of the pins, it is possible that that
16 is symmetrical where at the same moment in time, the overall
17 feedthrough filter capacitor is asymmetrical. Is that what
18 you are saying?

19 MR. MULDOON: Absolutely, Your Honor.

20 THE COURT: All right. But then I guess the
21 question becomes, in the patent, there is all this discussion
22 of the examples where we're only looking at the relative
23 number and, you know, placement of the pins. You all, it
24 seems to me, have advocated a position that that is a way
25 to measure symmetry.

1 The literal words of my opinion that I have read
2 to you seem to say that that is a way to measure symmetry,
3 and now you are asking me to say something different than
4 that, it seems. So help me with that.

5 MR. MULDOON: Well, it is not any different,
6 Your Honor, than what the Court has already said with
7 respect to that there aren't other ways, there aren't other
8 ways to measure symmetry at the motion to reargue and during
9 the trial.

10 It is not that you're -- yes, there was a focus
11 clearly on the location and number of the passageways because
12 that was a feature that was obviously asymmetric as the jury
13 found given that there were more holes on one side than the
14 other, but just because we focused on one asymmetrical feature
15 doesn't mean that there are not other asymmetrical features
16 of the capacitor as a whole that still makes the capacitor
17 asymmetrical.

18 THE COURT: So every comment where you said,
19 for instance, to the PTAB, this is the way the District
20 Court says to measure it, to measure symmetry. This is what
21 you do, you look at the pins or the passageways. All of
22 those should be understood in context as that is what you
23 were saying because that was the narrow dispute, but had
24 you really been asked, you would have said that is just
25 one place to look because it's easy. It's really, there

1 is plenty of places you could look for asymmetry.

2 MR. MULDOON: Of the capacitor as a whole, yes,
3 Your Honor. There was the arguments and the I believe it's
4 4,700 and-some-odd pages of the prosecution history -- of
5 the reexamination, I'm sorry, contain a number of arguments
6 with respect to what standard the Court should, I'm sorry,
7 the PTO should apply given the trial and the short term of
8 the patent remaining, but none of those were relied on by
9 the PTO.

10 The PTO, as the Court did, found no disclaimer
11 and chose a plain meaning of symmetrical, sorry, of
12 "asymmetrical" essentially as the Court did in its initial
13 first sentence of its language that "asymmetrical" is "not
14 symmetrical."

15 THE COURT: Is there anywhere in the patent
16 I can look to to see that the measure of symmetry or
17 asymmetry is not limited to the placement of the pins or
18 the passageways?

19 MR. MULDOON: Well, the language in the patent
20 I believe, I do not have a copy in front of me, Your Honor,
21 references that the capacitor is -- and it refers to the
22 capacitor in the first embodiments in Figures 1 to 6 which
23 is a rectangular capacitor with two equally spaced active
24 pins and passageways on either side.

25 The capacitor is also rectangular, and the pin

1 is clearly in the center of the rectangle, and the pins are
2 along the same major axis of that rectangle. As the patent
3 refers to that capacitor and that embodiment as symmetrical,
4 there are numerous features of that embodiment including the
5 ground plate, including the active plates, including the
6 shape of the capacitor, and the distribution of the ceramic
7 material around the capacitor being --

8 MS. SMALLEY: Yes, column 4. I'm sorry, Jim.

9 Column 4, line 27 said: Various embodiments of
10 the invention are disclosed herein which illustrate that the
11 feedthrough filter capacitor may be asymmetrical as well as
12 symmetrical about the ground lead.

13 So there are two separate concepts. There is
14 symmetry of the capacitor and then being symmetrical around
15 the ground lead.

16 THE COURT: Okay. Thank you for that, Ms. Smalley.

17 Mr. Muldoon or Ms. Smalley, either one, what
18 defendant posits, if I do as you say and deny this motion,
19 is that this trial is going to essentially be in large part
20 a claim construction hearing in front of the jury and that
21 that will be improper and confusing. Respond to that concern.

22 MR. MULDOON: Your Honor, we believe that the
23 claim construction that the jury should receive is that
24 asymmetrical is not symmetrical and not include the exemplary
25 language that was put in at a time when the focus was on only

1 one of the asymmetric features of that device.

2 THE COURT: And therefore what happens to the
3 opinions that these devices we have been looking at here
4 on page 4 of your letter are noninfringing alternatives?

5 MR. MULDOON: Well, clearly, Your Honor, with
6 respect to the plates, we have testimony from Dr. Hillman
7 that the plates are not the same on the left side as they
8 are on the right side, the distance between the setoff of
9 the plates to the edge of the capacitor, the overall shape
10 of the capacitor body are not symmetrical.

11 We believe that that is an issue that we'll be
12 addressing with respect to *Daubert* issues because we believe
13 that as Dr. Webster testified, that is at page 1580 of his
14 transcript, talking about plates being considered in
15 symmetry, as the Court has already raised another concept,
16 they had notice of these issues with respect to plates, and
17 we believe that all of their embodiments are not the same on
18 the right as the left and therefore not symmetrical and not
19 noninfringing.

20 THE COURT: Right. Okay. But just to be clear,
21 what you propose is that I would tell the jury asymmetry
22 is not symmetrical and then let their expert present these
23 six noninfringing alternatives and your expert explain why
24 he thinks you need to take a broader perspective as to the
25 overall capacitor and that they are infringing because they

1 are asymmetrical. Is that what you are saying?

2 MR. MULDOON: Yes, Your Honor. That is very
3 consistent with the language of *Grain Processing* where there
4 is no noninfringing alternative that was actually on the
5 market. That raises an inference that puts a burden on the
6 defendant to show that there were noninfringing alternatives
7 available, and we will show why each of these designs is not
8 symmetrical.

9 THE COURT: Okay. Is there anything else?

10 MR. MULDOON: And that is what the expert
11 opinions they are trying to exclude would do, as we say.

12 THE COURT: Anything else from Greatbatch then?

13 MR. MULDOON: No, Your Honor.

14 THE COURT: All right. Mr. Cahill, you can
15 respond.

16 MR. CAHILL: Sure, Your Honor. There is a lot
17 to respond to, but I think what I would like to do is to go
18 to the very end.

19 The solution that Greatbatch proposes would
20 radically change the claim construction in this case. And
21 if that were to happen, we would seek to propound new expert
22 reports that follow the new claim construction, and we
23 could have proposed other noninfringing alternatives had the
24 claim construction been different, and we didn't do that.
25 We followed the claim construction that we had and we stayed

1 within the Court's Orders.

2 Second, we would seek leave to vacate the jury
3 verdict from 2016 with respect to the '627 patent. We tried
4 validity in this case based on that claim construction and
5 now Greatbatch seeks to broaden it.

6 Third, we would go back to the Patent Office
7 with a new claim construction and invalidate the '627 patent
8 there as well. Because, again, the Patent Office was
9 looking at very different representations from Greatbatch
10 when it found claim 12 valid. I submit that the Court
11 cannot change the claim construction now without having us
12 go through all of those exercises.

13 THE COURT: Well, what about the argument
14 that it's not a claim -- it's not a change in the claim
15 construction, it's just you all were focused on the placement
16 of the pins and the passageways have been for years here and
17 in the PTO evidently, and so I addressed the dispute that you
18 had but never said or suggested that the measure ultimately
19 of whether there is symmetry is at the level of the overall
20 capacitor?

21 MR. CAHILL: Your Honor, that is just not what
22 the order says. So the order gives examples of symmetrical,
23 and we clearly fall within one of the examples of symmetrical.
24 And then it says "asymmetrical" means "not symmetrical."

25 I mean logically it is impossible for our

1 noninfringing alternatives to be asymmetrical under these
2 circumstances. It's logically impossible.

3 THE COURT: Well, let's break that down. Why
4 isn't it that at the same moment in time, your alternatives
5 can have placements of pins and passageways that meet our
6 definition of "symmetry" but be placed on an overall
7 capacitor that itself is asymmetrical?

8 MR. CAHILL: Well, Your Honor, if "asymmetrical"
9 means "not symmetrical," once you find symmetry, then it
10 can't be asymmetrical. I mean a capacitor can't be
11 symmetrical and asymmetrical at the same time.

12 THE COURT: Right. But the capacitor --

13 MR. CAHILL: It can if you want to revisit
14 indefiniteness.

15 THE COURT: Understood. But the capacitor can
16 be asymmetrical and have a component, maybe the most
17 important component, that is symmetrical, can't it?

18 MR. CAHILL: I'm sorry, Your Honor. I'm not
19 sure I followed that.

20 THE COURT: The placement of the pins and
21 passageways can be symmetrical on an overall capacitor that
22 could -- we could give it a random shape, but would be
23 indisputably the overall shape could be asymmetrical. Isn't
24 that possible?

25 MR. CAHILL: I don't think it is possible as a

1 matter of claim construction. The intrinsic evidence is
2 clear, symmetry and asymmetry is defined by the placement of
3 the pins with respect to the ground lead.

4 THE COURT: What about --

5 MR. CAHILL: That has always been.

6 THE COURT: What about column 4, line 27 that
7 Ms. Smalley read to us from the patent?

8 MR. CAHILL: Well, that doesn't tell us much of
9 something about what is symmetrical versus asymmetrical or
10 whether it's the pins or anything else.

11 THE COURT: Doesn't it suggest that the FFT may
12 be asymmetrical as well as symmetrical around the ground
13 leads?

14 MR. CAHILL: I don't think it does. I think
15 it says that the filter feedthrough capacitor can be
16 asymmetrical or it can be symmetrical and either one of
17 those is about the ground lead. And I understand that to
18 be the way the Court has construed the claim.

19 In other words, I think "about the ground lead"
20 modifies "asymmetrical" as well as "symmetrical." Otherwise,
21 you would have a feedthrough filter capacitor that was both
22 symmetrical and asymmetrical, in which case I really want to
23 go back to our indefiniteness argument.

24 THE COURT: Well, take Mr. Muldoon's car
25 example. If you are looking at it from the front and just

1 focus on the perspective of the headlights, the headlights
2 let's just stipulate are placed symmetrically vis-à-vis the
3 front perspective, but if we go and ask is the car overall
4 symmetrical or, if you are sitting in the driver's seat, you
5 know, are there two symmetrical steering wheels, we know
6 that there are not.

7 Why isn't this analogous to that, a component,
8 the component we have been focused on for five years or
9 so, is perhaps symmetrical but the overall vehicle, the
10 capacitor, can at the same moment be asymmetrical?

11 MR. CAHILL: Well, Your Honor, we've defined
12 symmetry in the capacitor by the only features that matter,
13 the only features that appear in the patent, in the file
14 history that have been the subject of argument for more
15 than four years now. And if you want to argue about whether
16 the car is asymmetrical, the car is asymmetrical and the
17 headlights are symmetrical.

18 Here, we have defined symmetry in the capacitor by
19 the only features that actually matter for symmetry purposes
20 because both the patent and the file history makes it clear
21 that the difference with asymmetry is because you place the
22 pins differently, you wind up with different impedance. That
23 has nothing to do with the shape of the ceramic on the outside.
24 It has to do with where you place the pins.

25 And we have been making these arguments for more

1 than four years now, and there has never been a suggestion
2 anywhere that it is anything other than the placement of the
3 pins that tells you whether the capacitor is symmetry or
4 asymmetry.

5 So it is not like the car example. If you said
6 the only thing in the car is that matters is the headlights,
7 then I think the car is symmetrical.

8 THE COURT: All right. Is there anything else,
9 Mr. Cahill?

10 MR. CAHILL: No, thank you, Your Honor.

11 THE COURT: All right. Mr. Muldoon, anything
12 you wanted to add?

13 MR. MULDOON: Just to request the Court's
14 attention that the underlying sentence from the pretrial
15 arguments where you clearly asked whether it was with
16 respect to the capacitor as a whole, and the response quoted
17 is as a whole, Your Honor, as described and claimed in the
18 patent references to plates and passageways.

19 THE COURT: Right. Thank you.

20 MR. CAHILL: Your Honor, if I could respond to
21 that?

22 THE COURT: Yes. Go ahead.

23 MR. CAHILL: That is completely out of context.
24 The dispute at that time was whether the hole for the RF pin
25 was part of the capacitor. And AVX argued that it wasn't

1 because it was completely outside of the other capacitor
2 features. That is why that argument was worded the way it
3 was worded.

4 THE COURT: All right. Well, thank you all. I
5 think this is a very difficult motion and a difficult
6 situation here. AVX is moving to strike these opinions of
7 Greatbatch's experts on the grounds that Greatbatch's
8 experts opinions are directly contrary to the Court's claim
9 construction.

10 I think, while this is a very close call,
11 ultimately I am siding with Greatbatch on this and I am
12 denying AVX motion. I don't deny what AVX is saying that
13 some of these, if not all of these, alleged noninfringing
14 alternatives meet the literal language of "symmetry" in an
15 example that I gave in my opinion construing asymmetry; the
16 summary judgment opinion, that is.

17 I don't deny that some or all of these alleged
18 noninfringing alternatives meet the literal language of what
19 I said in that order. I also don't deny that we derived
20 that language and those examples from the intrinsic evidence.
21 Specifically, the patent itself.

22 It's also true that the focus of much of the
23 litigation over this patent has been on the relative placement
24 of the pins and passageways and the capacitors and the
25 plaintiff has said all the things that the defendant says that

1 the plaintiff has said.

2 Nonetheless, I believe and hope I have been
3 consistent that the ultimate measure of symmetry or asymmetry
4 is not necessarily the placement of the pins and the
5 passageways. It is ultimately a measure of the overall
6 capacitor itself.

7 Just because we have spent a lot of time and
8 energy and no doubt money litigating the placement of the
9 pins and the passageways because Greatbatch thought it
10 could prove asymmetry at that level doesn't mean that they
11 couldn't have at that time and more importantly can't now
12 try to prove asymmetry at another level, i.e., at the
13 totality of the overall capacitor.

14 I think there is support in the statements that
15 I have made that Greatbatch has pointed to for that view.
16 I think there is at least some intrinsic support for that
17 view, including in column 4, line 27 that Ms. Smalley
18 helpfully called out here on the call today.

19 So the end result of that is I'm not striking
20 what Greatbatch's expert has opined about these noninfringing
21 alternatives. I'm also not striking the opinion of AVX's
22 expert that they are in fact noninfringing alternatives.

23 I will do my best at trial not to let this
24 devolve into an improper claim construction hearing in front
25 of the jury. I'll need some help from the parties in the

1 pretrial order, pretrial conference and at trial to help me
2 make sure that doesn't happen. But I think that ultimately
3 you have all hit upon a genuine dispute of fact that both
4 sides experts can opine on, and we'll get the jury's view
5 ultimately on it.

6 I have considered the *Pennypack* Factors. I
7 don't think they really play a big role here. Really, the
8 substance of the motion turns on whether I think what the
9 plaintiff has done is inconsistent or directly contrary
10 with my construction, and therefore I don't think what I'm
11 ruling is blessing Greatbatch for acting in bad faith or
12 trying to confuse the jury. I think what Greatbatch has
13 done is timely. They are responding to timely disclosed
14 opinions of AVX's experts.

15 I don't think this needs to have any impact on
16 the trial date. And I see no basis to grant the alternative
17 relief that AVX requested of yet more expert opinions and
18 more expert discovery or claim construction briefing or
19 revising an indefiniteness defense.

20 Everyone has the schedule. I have found today
21 everyone acted consistent with the schedule, everyone acted
22 consistent with my claim construction, and we're going to
23 have a trial at which both sides will have a full and fair
24 opportunity to present their cases. So the motion is denied.

25 Any questions about that, Mr. Cahill?

1 MR. CAHILL: Well, Your Honor, I was going to
2 ask for five business days to provide a new expert report.
3 It sounds like you already denied it.

4 THE COURT: Well, if Greatbatch wants to agree
5 to it, I'll change my mind but, Mr. Muldoon, do you want to
6 agree to that?

7 MR. MULDOON: At this point, no, Your Honor.
8 But we'll be happy to continue discussions with counsel off
9 the record.

10 THE COURT: Yes, why don't you all discuss that.
11 I certainly don't mean to say, Mr. Cahill, that you all can't
12 agree to further share your positions with one another,
13 including through more expert disclosures.

14 I do really need your help to make sure that we
15 don't turn this into one long claim construction hearing. And
16 it may well be that you all being as thorough in disclosing to
17 one another what it is you propose to do as possible will help
18 me in that regard. So I may have been a little too quick in
19 saying no further expert disclosures, but I'm going to leave
20 it to you all to discuss that first.

21 Anything else, Mr. Cahill?

22 MR. CAHILL: No, Your Honor.

23 THE COURT: And Mr. Muldoon?

24 MR. MULDOON: No, Your Honor.

25 THE COURT: I hope you all have a nice

1 Thanksgiving. Thanks very much. Good-bye.

2 (Telephone conference ends at 3:48 p.m.)

3

4 I hereby certify the foregoing is a true and accurate
5 transcript from my stenographic notes in the proceeding.

6

7 /s/ Brian P. Gaffigan
8 Official Court Reporter
9 U.S. District Court

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